83-1471

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

SUSAN MARY NORRIS,

Respondent,

vs.

WILLIAM W. WIRTZ, individually and as trustee, ARTHUR M. WIRTZ, individually and as trustee, ST. LOUIS ARENA CORPORATION, a corporation, ARENA BOWL, INC., a corporation, and WIRTZ CORPORATION, a corporation,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented for Review

I. Should a cause of action be implied pursuant to Section 10(b) of the Securities Exchange Act of 1934 for alleged fraud in the sale of securities by an estate?

II. Does a beneficiary of a residual testamentary trust have standing to bring suit pursuant to Section 10(b) of the Securities Exchange Act of 1934 against the trustee for alleged fraud in the sale of securities by an estate?

Parties

The parties are properly designated in the caption. ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION are corporations. The ST. LOUIS ARENA CORPORATION and ARENA BOWL, INC. are subsidiaries of WIRTZ CORPORATION (Supreme Court Rule 28.1).

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Opinions Below

The original decision of the United States Court of Appeals for the Seventh Circuit ("appellate court") has been reported as *Norris* v. *Wirtz*, 719 F.2d 256 (7th Cir. 1983), and is set forth in the Appendix at App. 1-24. The defendants petitioned for rehearing, and the appellate court denied rehearing and ordered its original decision to be amended, which order is set forth in the Appendix at App. 56-62.

The memorandum and order of the United States District Court for the Northern District of Illinois ("district court"), granting the defendants' motion to dismiss the complaint, is reported as *Norris* v. *Wirtz*, 551 F. Supp. 46 (N.D. Ill. 1982) and is set forth in the Appendix at App. 25-55.

Jurisdiction

The original decision of the appellate court was entered on October 14, 1983 (App. 1-24). The appellate court entered an order on December 22, 1983, denying the defendants' petition for rehearing and amending the original decision (App. 56-62).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 and 2101(c).

Pertinent Statutory Provisions

15 U.S.C. § 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> • • •
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. § 240.10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances, under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Statement of the Case

James D. Norris died in 1966 and was the father of the plaintiff-respondent, SUSAN MARY NORRIS ("Susan Norris" or "beneficiary"). Through his Last Will and Testament, he appointed Mary Norris, his wife and the mother of the plaintiff, and the defendant-petitioner WILLIAM W. WIRTZ ("William Wirtz") as co-executors of his estate. The defendant-petitioner ARTHUR M. WIRTZ ("Arthur Wirtz"), the father of William Wirtz, was appointed the successor executor to William Wirtz (App. 102). James D. Norris granted his co-executors "full power and authority at any time or times to sell, mortgage, pledge, exchange or otherwise deal with or dispose of the property comprising my estate upon such terms as they deem best. . . ." (App. 99).

James D. Norris had owned, *inter alia*, forty-nine percent (49%) of the shares of stock of two closely

held corporations, ST. LOUIS ARENA CORPORATION and ARENA BOWL, INC. He had also owned five percent (5%) of the shares of stock of Judge & Dolph, Ltd., another closely held corporation. Defendant-petitioner WIRTZ CORPORATION, controlled by Arthur Wirtz, owned fifty-one percent (51%) of the shares of the stock of ST. LOUIS ARENA CORPORATION and ARENA BOWL, INC. and eighty percent (80%) of the shares of the stock of Judge & Dolph, Ltd.

The Last Will and Testament provided for the funding of two trusts upon the closing of the estate: Trust A for the benefit of Mary Norris and Trust B for the benefit of Susan Norris. William Wirtz was appointed individual trustee of both trusts.

In his Last Will and Testament, James D. Norris acknowledged: "I fully appreciate and recognize that discretionary retention of the securities of such closely held corporations and an orderly liquidation of same would be to the best interests of ARTHUR M. WIRTZ and his family members as well as to my estate and the trusts created hereunder, for which reasons the Trustee nominated by me has accordingly been granted the authorizations, discretions and powers herein provided." (App. 83). He further expressly authorized the individual trustee to: (a) participate in the management of the closely held corporations; and (b) supervise the conduct of the closely held corporations' business (App. 84).

The Last Will and Testament provided procedures for the sale of the testator's minority stock interest in the closely held corporations *by the individual trustee.*

These procedures, which were not applicable to sales from the estate by the co-executors, included a "first opportunity" for the closely held corporations to purchase the securities (App. 85-86); for purchase by the shareholders of the closely held corporations (App. 86), by third parties (App. 86-87), and by the individual trustee (App. 84-85). The Last Will and Testament required the beneficiary's consent to sales only if Trust B was the seller and the individual trustee was the purchaser (App. 84-85, 90).

James D. Norris further provided in his Last Will and Testament that: "The decision and judgment of my Trustee to retain my aforesaid interest, to partially liquidate, or to sell and dispose of my interest in its entirety, shall be final, binding and conclusive, and my Trustee shall not be accountable to any present or future income beneficiaries for his action in the performance and the exercise of the powers and authorizations herein conferred upon such Trustee" (App. 90).

In 1967 and 1968, prior to the funding of the residuary trusts, the co-executors petitioned the Circuit Court of Cook County, Illinois, where the Last Will and Testament was probated, for leave to sell the estate's interests in the closely held corporations. Pursuant to orders of that court, the shares of stock of ST. LOUIS ARENA CORPORATION and ARENA BOWL, INC. were redeemed by said corporations, and the shares of stock of Judge & Dolph, Ltd. were purchased by WIRTZ CORPORATION. Subsequently, when the estate was closed and pursuant to the Last Will and Testament, the assets of the estate were distributed to the legatees, including Trust B.

On December 24, 1980, Susan Norris filed her complaint, alleging, *inter alia*, that the amounts paid to the estate from the aforementioned sales were determined by the *pro rata* asset costs of the businesses and were not at fair market value. She further alleged that the proceeds were inadequate, allegedly known by William Wirtz to be inadequate, and that William Wirtz thereby engaged in a scheme to defraud, in violation of Section 10(b) of the Securities and Exchange Act and Rule 10b-5 of the Securities and Exchange Commission. Jurisdiction was alleged under 15 U.S.C. § 78aa and 28 U.S.C. § 1331. She contemporaneously filed a complaint in the Circuit Court of Cook County, Illinois (App. 49).

Argument

Special and important reasons exist for this Court to grant this petition. The appellate court's decision directly conflicts with this Court's decisions limiting both the types of actions for which a cause of action may be implied pursuant to Section 10(b) and the class of plaintiffs who may bring such actions. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 463 (1977) and *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

I

This Court, in *Santa Fe*, stated that a cause of action pursuant to Section 10(b) "should not be implied where it is 'unnecessary to insure the fulfillment of Congress' purposes' in adopting the Act." 430 U.S. at 477. The two factors for the lower courts to consider in determining whether implying a cause of action is necessary to fulfill Congressional intent are: if the action would implement a policy of full disclosure between the *participants*, to a securities transaction; and if the action is traditionally relegated to state laws. 430 U.S. at 478. The appellate court herein implied a cause of action where the alleged misrepresentations did not occur between the participants to a securities transaction and the action is traditionally relegated to state laws. The present case constitutes an attempt to avoid and circumvent the guidelines this Court established in *Blue Chip Stamps* and *Santa Fe*.

The appellate court erred by implying a cause of action for a testamentary residual trust beneficiary pursuant to Section 10(b) of the Securities Exchange

Act of 1934. As Judge William J. Bauer stated in dissenting from the appellate court's decision: "*This type of case is far better left to state courts*" (App. 23; emphasis supplied). The district court found: "Plaintiff claims that fiduciary Wirtz misled her, his co-executor and the court in valuing those assets. Such are *the stuff of state chancery actions* and, indeed, plaintiff contemporaneously with this action filed an action in state court" (App. 49; emphasis supplied). Both the dissenting appellate court judge and the district court agreed with this Court's decision in *Santa Fe,* 430 U.S. at 477, that "a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act" (App. 20-21, 50).

The Seventh Circuit previously applied *Santa Fe* correctly in *O'Brien* v. *Continental Illinois Bank & Trust Co. of Chicago,* 593 F.2d 54, 62-63 (7th Cir. 1979). *O'Brien* involved claims made by certain pension funds against the Continental Illinois National Bank and Trust. The pension funds had deposited money with Continental under agreements characterized as either trust agreements or agency agreements. Continental was given the responsibility to make "such investments as in its sole discretion it saw fit, subject to a fiduciary duty of care." 593 F.2d at 57. Continental had purchased stock in companies of which the bank was a substantial creditor. Continental had knowledge of adverse information with respect to the companies.

After reviewing the relevant cases, the appellate court in *O'Brien* held that the alleged non-disclosures of

material facts did not relate to investment decisions, but to other actions plaintiffs might have taken against the trustee for breach of fiduciary duty, which actions were not the proper subject matter of the securities laws. 593 F.2d at 60. The *O'Brien* court specifically noted that the trial judge was reluctant to superimpose upon state fiduciary law "a requirement that trustees inform their beneficiaries of information prior to making investments solely within the trustees' discretion." 593 F.2d at 61. Thus, the *O'Brien* court did not imply a cause of action.

The two policy considerations applied by this Court in *Santa Fe* mandate reversal of the appellate court's decision to imply a cause of action for the beneficiary. Applying this Court's "traditional state court forum" consideration to the instant action, petitioners respectfully submit that Congress did not intend to allow beneficiaries of testamentary residual trusts to challenge the actions of estates, traditionally governed by state courts, in the federal courts merely because the estate sells its securities at a price the prospective beneficiary alleges to be inadequate, fraudulent, or a breach of fiduciary duty. This beneficiary had a traditional forum for such allegations, the Circuit Court of Cook County, Illinois, and instituted an action before that court to pursue her remedy. Innumerable estates own securities, and if the appellate court's decision to imply a cause of action for securities fraud is not reversed by this Court, every estate, trust and fiduciary relationship which arguably involves the sale, proposed sale, purchase, manipulation, or speculation with a security, would become a federal question, resulting in federal courts being overburdened, traditional state law being pre-empted, and inconsistent, con-

fusing and overlapping regulations being imposed on the public.

Congress only intended to implement a "philosophy of full disclosure" between the *participants* to a transaction. 430 U.S. at 478. Applying this Court's ruling in *Santa Fe,* that a cause of action should not be implied where "unnecessary to ensure the fulfillment of Congress' purposes," the beneficiary herein was not a participant. She had no decision regarding the sale by the estate, and thus the alleged misrepresentations were not made "in connection with" a sale or purchase of securities. 15 U.S.C. § 78j(b).

The appellate court erroneously found that the beneficiary had an investment decision and was a participant to these sales (App. 58-61). Although her consent was obtained, under the Last Will and Testament this beneficiary had no decision regarding the estate's sale of the securities prior to the funding of the trust and none even after funding with respect to sales to parties other than to the individual trustee (App. 99). The securities were neither sold nor purchased by the individual trustee, although this was explicitly provided for by the Last Will and Testament (App. 84-85). As the district court found, "James Norris well recognized that his assets in large measure were interests in closely-held corporations shared with Wirtz family members. . . . The carefully spelled out procedures for disposing of shares in the closely held corporations are contrary to the suggestion that 'individual trustee' was somehow shorthand for 'closely-held corporation." (App. 54-55). James D. Norris knew that Arthur Wirtz, William Wirtz and the closely held corporations were the most likely purchasers of his estate's minority stock interest and made a clear and explicit

differentiation between purchases by the closely held corporations and the individual trustee. The appellate court, contrary to the express and explicit testamentary provisions, ignored that distinction in finding that the individual trustee was "virtually" a closely held corporation (App. 60, 85-90).

"The law is clear in Illinois that the intention of the testator governs distribution of his estate." *In re Estate of Sax*, 92 Ill. App. 3d 787, 791, 416 N.E. 2d 309 (App. Ct. 1981). "Courts are without power, under the guise of interpretation, to change a testator's will or to make a new one for him. [Citations omitted.] A court may not distribute the testator's estate according to the court's sense of the equity and justice rather than the testator's intention as expressed in the will." *Continental Illinois National Bank & Trust Co. of Chicago* v. *Bailey*, 104 Ill. App. 3d 1131, 1138-39, 433 N.E. 2d 1098 (App. Ct. 1982).

As the dissenting judge stated:

> I cannot subscribe to the majority's broad interpretation of the will as applying to all instances of apparent self-dealing. . . . Federal securities law does not contemplate the exercise of federal jurisdiction in cases requiring resolution of purely state trust law issues as a prelude to deciding whether fraud existed in a transaction which the plaintiff, at the time, could not control" (App. 61, 23).

The appellate court's labelling the sales to the closely held corporations as sales to the individual trustee is clearly erroneous. "This cryptic conclusion seems to ignore the ancient wisdom that calling a thing by a name does not make it so." *City of Madison Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 174 (1976).

The appellate court's decision illustrates the dangers of a federal court's usurping the traditional province of a state court. The appellate court rewrote the Last Will and Testament by finding that: "It was precisely to prevent self-dealing that the testator gave his daughter the ultimate voice in making the investment decisions 'in connection with' such transactions" (App. 61). Quite the opposite, the testator excluded his daughter from participation in any investment decision except sales by Trust B to the individual trustee (App. 70-72) and forbade any distribution of the principal from Trust B until the beneficiary attained forty years of age (App. 72). It was the individual trustee and not the beneficiary who was authorized: ". . . in his best judgment and discretion to liquidate such securities whenever it is deemed to be to the best interest of the trusts created hereunder and the decision and judgment of my said Trustee shall be conclusive, binding and final and no present or future income beneficiary shall question the decision or good faith of such Trustee" (App. 90).

Accordingly, respondents respectfully submit that the decision of the appellate court is in conflict with *Santa Fe*. The decision is based upon a convoluted, factually inaccurate, and erroneous interpretation of the Last Will and Testament in order to find the magic "consent" it believed was required to satisfy the *Santa Fe* standard. In so doing, it misinterpreted and misapplied the language and intent of this Court's decisions.

II

As the district court found: "There is no controlling case authority on this question since neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has yet decided whether beneficiaires of a sale in Susan Norris' position have standing to maintain a 10b-5 action" (App. 47). The appellate court decided that the beneficiary had standing. This decision directly conflicts with the Court's decision that only *actual* buyers and sellers have standing to bring an implied cause of action pursuant to Section 10(b). *Blue Chip Stamps,* 421 U.S. at 742-47; *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2d Cir.), *cert. denied,* 343 U.S. 956 (1952). This case will determine whether the *Birnbaum* rule is still in effect or if it has been "gradually eroded on a case-by-case basis." 421 U.S. at 755.

The appellate court correctly found that "the *actual* sales of the securities held in trust were made by the co-executors of plaintiff's father's estate, and not by the plaintiff" (App. 10) (emphasis supplied). Despite her not being the actual seller, the appellate court circumvented and vitiated the decision of this Court in *Blue Chip Stamps,* 421 U.S. at 747.

The securities were sold by the estate to the closely held corporations. The plaintiff was neither the buyer nor the seller (App. 29-30).

The appellate court erroneously found that Susan Norris was not a "by-stander" because she "experienced the direct impact of the securities transaction, for she was the beneficiary of the trust involved" (App. 11). The appellate court erroneously interpreted this Court's decision in *Blue Chip Stamps* to only deprive standing

to a "by-stander" (App. 11). The appellate court found: "This position is attractive" (App. 11). In so holding, the appellate court cited other decisions in which the courts have violated the *Birnbaum* rule by creating exceptions thereto. *See, e.g., Kirshner* v. *United States,* 603 F. 2d 234, 240-41 (2d Cir. 1978), *cert. denied,* 442 U.S. 909 (1979); *Mallis* v. *Federal Deposit Insurance Corp.,* 568 F. 2d 824, 828-830 (2d Cir.), *cert. granted,* 431 U.S. 928 (1977), *cert. dismissed,* 435 U.S. 381 (1978); and *O'Brien* v. *Continental Bank & Trust Co.,* 593 F. 2d 54 (7th Cir. 1979), wherein the plaintiffs were principals of an agency and beneficiaries of an *inter vivos* trust which actually sold the securities (App. 11-12).

"The virtue of the *Birnbaum* rule, simply stated, in this situation, is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates." *Blue Chip Stamps,* 421 U.S. at 747. This Court further stated that:

> Were we to agree with the Court of Appeals in this case, we would leave the *Birnbaum* rule open to endless case-by-case erosion depending on whether a particular group of plaintiffs was thought by the court in which the issue was being litigated to be sufficiently more discrete than the world of potential purchasers at large to justify an exception. We do not believe that such a shifting and highly fact-oriented disposition of the issue of who may bring a damages claim for violation of Rule 10b-5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions.

Blue Chip Stamps, 421 U.S. at 755.

Unfortunately, during the ten years since this Court adopted the *Birnbaum* rule, it has undergone "case-by-

case erosion." In the instant action, the erosion is most vivid and almost complete. The plaintiff was the prospective beneficiary of an unfunded residual testamentary trust. The estate's securities were never owned, sold or purchased by the plaintiff, Trust B, or the individual trustee. Accordingly, petitioners respectfully submit that the respondent did not have standing to bring this action.

Conclusion

The appellate court's decision conflicts with this Court's decisions in *Santa Fe* and *Blue Chip Stamps* by erroneously implying a cause of action and finding that the plaintiff had standing.

Wherefore, the petitioners respectfully pray that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

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